Supreme Court, U. S.
FILED
AUG 16 1974
MICHAEL RODAK, JR., CLERK

[No. 73-1395]

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE J. WILSON, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
HENRY E. PETERSEN,
Assistant Attorney General,
ANDREW L. FREY,
Deputy Solicitor General,
EDWARD R. KORMAN,
Attorney,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The Judgment Order of the court of appeals dismissing the appeal (Pet. App. A) is reported at 492 F. 2d 1345. The opinion of the court of appeals denying the petition for rehearing (Pet. App. B) is reported at 492 F. 2d 1345. The memorandum and order of the district court are reported at 357 F. Supp. 619 (Pet. App. D).

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1973. A timely petition for rehearing was denied on January 15, 1974. On February 6, 1974, Mr. Justice Brennan extended the time for filing

a petition for a writ of certiorari to and including March 16, 1974. The petition was filed on March 15, 1974, and was granted on May 28, 1974, along with the petition in *United States* v. *Jenkins*, No. 73-1513, and the cases were set down for argument in tandem (App. 222). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment bars an appeal by the United States from an order of the district court, entered after a jury verdict of guilty, dismissing an indictment on the ground of unnecessary pre-indictment delay.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

18 U.S.C. 3731, as amended, 84 Stat. 1890, provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> * * * * *
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

STATEMENT

In an indictment returned on October 28, 1971, in the Eastern District of Pennsylvania, respondent, George J. Wilson, Jr., was charged with having converted to his own use funds of a labor organization, in violation of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 501(c). The indictment alleged that on or about November 1, 1966, respondent, financial secretary and business manager of Local 367 of the International Brotherhood of Electrical Workers (App. 76, 82), had converted $1,233.15 in funds belonging to the Union, through a check issued by two officers of the Union, Robert Schaefer and Robert L. Brinker, for the purpose of paying the cost of a wedding reception for his daughter (Pet. App. B 4a).

1. THE PRETRIAL MOTIONS AND HEARINGS

On December 23, 1971, respondent filed a motion to dismiss the indictment on the ground that the delay in bringing him to trial violated the Speedy Trial Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment. At pretrial hearings on February 17 and March 14, 1972, respondent argued that the indictment should be dismissed because Schaefer and Brinker, the signatories to the check in issue, were no longer available to testify. Brinker had died in 1968 (App. 30), and Schaefer was suffering from a terminal illness (App. 15, 34).

The only witness at the February 17 pretrial hearing was Special F.B.I. Agent Joe Hargis, who testified about the conduct of the investigation of this and

other cases involving respondent. He stated that the F.B.I.'s investigation began in April 1968 and continued through July 1970, although the aspect of the investigation concerned with the instant charges was substantially complete by June 1969 (App. 20, 21, 26, 32). He also testified that by early 1970 a grand jury was investigating the matter (App. 29) and that he discussed the case with the United States Attorney's office in late 1970 and early 1971 (App. 29–30). He denied that his investigation had revealed that Schaefer was terminally ill (App. 27), and he stated that Brinker had died before he could interview him (App. 27). After the hearing, the district court denied the motion to dismiss the indictment.

At a hearing held on March 14, 1972, to reconsider the motion to dismiss the indictment, Mrs. Jean Sippel, the Local's office secretary, testified that lists of checks were brought to her by Miss Gloria Hunt, secretary of Easton Arms, Inc., a non-profit corporation created by the Local to carry out a public housing project, and that she would prepare checks marked "re Easton Arms" from this list and submit them, along with the list, to Brinker and Schaefer, who would sign the checks and corresponding vouchers (App. 39–41). She testified that the check for the wedding reception had been filled out by her and processed in this manner. The United States Attorney argued, accordingly, that since Brinker's and Schaefer's signatures were perfunctory, their inability to testify could not be prejudicial to respondent's case (App. 48).

Respondent testified that he had discussed the wedding with Brinker and Schaefer in June 1966 with reference to the guest list and that about 80 percent of those invited were connected with the union-sponsored housing project (App. 53). He also stated he never directed Mrs. Sippel to issue the check (App. 54) and that he discovered the bill for the reception had been paid during a conversation with Schaefer and Brinker about Thanksgiving or Christmas 1966. According to his testimony, they stated in regard to the bill: "Don't worry about it, it's paid," adding, "Well, it's part of promotion. It could have been just another political thing" (App. 54).

Following the hearing, respondent's motion to dismiss the indictment was again denied,[1] and the case proceeded to trial (App. 64).

2. THE TRIAL

It was established at trial that on June 25, 1966, a wedding reception was held for respondent's daugh-

[1] In denying the motion, the district court relied on *United States* v. *Dibrizzi*, 393 F. 2d 642 (C.A. 2), in which the court of appeals stated in respect to a prosecution under 29 U.S.C. 501(c) (*id.* at 645):

"Here, appellant maintains that the expense items for which the Government showed the union was billed and which the union paid were authorized and adopted by it with knowledge of all the facts and without any fraudulent misrepresentations having been made by him. However, the Government adduced at the trial enough evidence from which the jury could have found beyond a reasonable doubt that the items were personal non-business expenses and in no way incurred in furtherance of the union's business. Therefore, the jury could reasonably have inferred, in turn, that appellant intended to receive

(Continued)

ter at the Easton Motor Hotel (App. 98). The manager of the hotel explained that the cost of the wedding reception had been $2,233.15, of which $1,000 had been pre-paid in the form of a deposit by William Burke, the Local's attorney,, on June 20, 1966 (App. 96–98,163). He also testified that, following the reception, a bill for the balance of the cost of the reception, $1,233.15, had been made out in the name of respondent and had been sent to his home (App. 97, 102; G–3, App. 214). The manager stated that if a bill were not paid within thirty days, it was the policy of the hotel to repeat the billing each thiry days thereafter (App. 97–98, 104). The bill was finally paid by a union check for $2,024.09 dated November 1, 1966, and endorsed by Schaefer, the president of the Local, and Brinker, its treasurer (App. 98–99, 207) [2]. The check was marked "re Easton Arms, Inc.," a reference to the non-profit

(Continued)

and knew he was receiving union funds for purely personal expenses. Thus, viewing the evidence, as we must, most favorably to the Government, * * * it appears to us that the jury quite reasonably drew the inference that this intelligent appellant was acting wilfully. Even if appellant may have established that his expenses were, as he claims, authorized and adopted by the union, such does not absolve him of his crimes; the reach of § 501(c) is not limited to union officers who engage in stealthy larcenies or devious embezzlements but extends to an officer who 'unlawfully and wilffully abstracts or converts to his own use' the funds of a labor organization. When one sends the union a voucher known to be an improper one, and then receives payment of the voucher, the crime is completed. * * *"

[2] Mrs. Sippel again testified regarding the Local's procedures for issuing checks; the testimony was substantially the same as that given at the pretrial hearing (App. 76–81, 86–91).

corporation created by the Local to build a million-dollar public-housing project, backed by a government-insured loan obtained by the corporation from a trust company (App. 78, 153, 169).[3] Although the manager of the hotel was unable to recall who directed it to do so (App. 106), the hotel applied $790.94 of the amount to the account of William Burke and $1,233.15 to satisfy the balance outstanding for the wedding reception (App. 98–100; G–4, App. 215).

Respondent testified that he had appointed Brinker and Schaefer to office jobs, under which they had authority to endorse Union checks, and that they were responsible to him as his assistants for their activity in that capacity (App. 174–175); [4] he maintained, however, that he had never authorized anyone to issue the Union check used to pay his bill for the wedding reception (App. 164). Respondent also stated that he had reimbursed Burke for the $1,000 deposit, that

[3] The project, a low-to-moderate-income apartment complex known as Kennedy Gardens, was, according to respondent's testimony, being constructed by the Union for the community in the anticipation that the building eventually would revert back to the non-profit corporation and could be used for the Union's pension fund (App. 147, 150). Respondent, Brinker, Schaefer, and Burke served on the Board of Directors of Easton Arms, Inc. (App. 80, 177–178). It was common for certain expenses of Easton Arms, Inc., eventually amounting to about thirty to forty thousand dollars, to be advanced by the Union (App. 80).

[4] These office jobs were distinct from the official Union positions held by Brinker and Schaefer, and their function in issuing the checks was unrelated to their official positions. In their office capacities, they served as respondent's agents (App. 113–114).

about Thanksgiving or Christmas of 1966 Brinker had told him that the bill for the balance had been paid, and that he had assumed that Burke had paid it (App. 196, 163–164). He maintained, however, that he did not know that the bill had been paid from union funds until he read about his indictment in the local newspaper (App. 164).

Respondent further testified that it was often necessary for him to "wine * * * and dine" prominent persons at the Easton Arms Hotel to obtain their support for the housing project (App. 157) and that these expenses were paid by the Union, which would be reimbursed by Easton Arms, Inc., when funds became available (App. 116–117, 157–158). Moreover, in addition to certain members of the Union, persons who were in government positions and could be helpful in obtaining tenants and approval for additional units for the Kennedy Gardens project had been invited to his daughter's wedding reception (App. 162).

Respondent also offered testimony of Agent Hargis regarding the course and duration of the pre-indictment investigation (App. 197–204).

At the close of the prosecution's case-in-chief, respondent moved for a directed verdict of acquittal on the ground that none of the witnesses had testified that respondent had given instructions directing payment of the hotel bill (App. 131; Tr. 109–110). The district court, again citing *United States* v. *Dibrizzi*, *supra*, denied the motion, concluding that there was sufficient evidence to go to the jury (Tr. 110–113). After the return of the guilty verdict, the judge denied a renewed motion for a judgment of acquittal (App. 206).

3. THE POST-TRIAL MOTIONS AND THE DISMISSAL OF THE INDICTMENT

On March 23, 1972, respondent filed post-trial motions for arrest of judgment, judgment of acquittal, and a new trial. Each of these motions again asserted, *inter alia*, the alleged unreasonable delay in presenting the charges to the grand jury as a ground for relief (App. 217, 219, 221). Each of the motions likewise incorporated by reference respondent's pretrial motion to dismiss the indictment (App. 218, 220, 221).

On April 18, 1973, the district court entered an order dismissing the indictment pursuant to Rule 48(b), Fed. R. Crim. P.[5] After discussing the criteria set forth in *United States* v. *Marion*, 404 U.S. 307, regarding the circumstances under which an indictment may be dismissed for pre-indictment delay, the district court held that the pre-indictment delay in this case deprived respondent a fair trial. In reaching this conclusion, the district court took "notice of the facts brought out in the testimony of the case concerning the potential testimony of Mr. Schaefer" (Pet. App. D, 14a–15a):

[5] The district court's order, which was appended to its memorandum (Pet. App. D, 11a–15a), was inadvertently omitted from our appendix to the petition for certiorari. It stated:

"AND NOW, this 18th day of April, 1973, it is hereby Ordered that the above captioned case is Dismissed with prejudice pursuant to Rule 48(b) of the Federal Rules of Criminal Procedure."

We note that, as a technical matter, Rule 48(b) applies only to *post-arrest*, pre-indictment delay. *United States* v. *Marion*, *supra*, 404 U.S. at 319 n. 11. Accordingly, it would not be applicable here.

Mr. Wilson, the defendant, stated (40–41 of the Notes of Testimony of the pre-trial hearing held on March 14, 1972) that the signing of all union checks was in the hands of Mr. Brinker and Mr. Schaefer. During the trial (N.T. 133–134) the defendant indicated that he never involved himself with bookkeeping or the internal affairs of the office. Finally, Mr. Wilson stated that he ordered no one to write the check in question. (N.T. 164–165).

On the Government's side, it was established that the bill from the wedding reception was sent to the defendant's home address and not to the union (N.T. 62). Also, Mrs. Jean Sippel, the office secretary for the I.B.E.W. and the individual who prepared the checks for the signature of Mr. Brinker and Mr. Schaefer stated that at no time had a check prepared by her been sent back without being signed. Other testimony established that Mr. Wilson controlled the union (N.T. 17), and that Mr. Schaefer and Mr. Brinker were office help who owed their jobs to the defendant. (N.T. 80, 181).

The district court concluded (Pet. App. D 15a):

> [T]he unreasonable delay was substantially prejudicial to the case of Mr. Wilson in that the only witness who could explain the circumstances of the check became terminally ill during the period of unreasonable delay. Although the government contends that this is only a showing of potential or speculative prejudice, there is an absolute certainty as a signer of all checks that Mr. Schaefer would add testimony of utmost importance to the trial. Because of the unreasonable delay, substantial prejudice resulted which violated the defendant's due process rights under the Fifth Amendment.[6]

The district court made no effort to reconcile this order with its pretrial order denying the motion to dismiss. Although the district court did allude to evidence heard at the trial, it failed to indicate what that evidence added to facts already disclosed at the pretrial hearing. Moreover, the district court likewise made no effort to reconcile its finding regarding the significance of Mr. Schaefer's testimony with its charge to the jury, under which the jury could have convicted whether or not Mr. Schaefer or Mr. Brinker was expressly ordered by respondent to write the check (Tr. 275–276).

4. THE APPEAL TO THE COURT OF APPEALS

The United States filed a notice of appeal pursuant to the Criminal Appeals Act, 18 U.S.C. 3731, which authorizes an appeal to the court of appeals from an order of the district court dismissing an indictment "except * * * where the double jeopardy clause of the United States Constitution prohibits further prosecution." On September 21, 1974, the court of appeals, relying upon *United States* v. *Sisson*, 399 U.S. 267, held that "the district court's order [was] not appealable * * * under 18 U.S.C. 3731" and entered a

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[6] The district court concluded that respondent had not been prejudiced by unreasonable delay due to the unavailability of Brinker, who died in 1968 (Pet. App. D 14a):

"* * * Mr. Brinker died prior to 1970 and consequently his testimony would have no bearing on the question of prejudice during the period of unreasonable delay which commenced in late 1970."

"Judgment Order" dismissing the indictment (Pet. App. A).[4]

On the assumption that the court of appeals was relying on that portion of *Sisson* that had construed the old Criminal Appeals Act "as confining the Government's right to appeal—except for motions in arrest of judgment—to situations in which a jury has not been impaneled" (399 U.S. at 302–303), a petition for rehearing or rehearing *en banc* was filed, since it was plain from the legislative history that Congress intended to overrule *Sisson* when it amended the Criminal Appeals Act (18 U.S.C. 3731) to permit appeal from a dismissal of an indictment except where the Double Jeopardy Clause prohibits further prosecution.[5] Moreover, on the authority of cases such as *United States* v. *Dooling*, 406 F. 2d 192 (C.A. 2), certiorari denied *sub nom. Persico* v. *United States*, 395 U.S. 911, which held that it was improper for a district court judge to grant a post-trial motion to dismiss an indictment on the same grounds examined and rejected prior to trial, and that mandamus was available to set aside such a dismissal, a petition for a writ of mandamus was filed as an alternative to the petition for rehearing.

On January 15, 1974, the court of appeals denied the motion for rehearing in a six page opinion (Pet. App. B 3a–9a).[6] Rather than relying on a con-

[4] See S. Rep. No. 91-1296, 91st Cong., 2nd Sess., p. 11:

"One example of the kind of case which would thereby be made appealable is the *Sisson* case".

[5] The petition for rehearing *en banc* was denied with one judge dissenting (Pet. App. C 10a). The court of appeals also denied the application for a writ of mandamus (*ibid.*).

struction of Section 3731, the court of appeals held that the post-conviction dismissal for unnecessary delay in prosecution was an acquittal and that further appellate review was barred by the Double Jeopardy Clause.

The court of appeals held that, regardless of label, "[t]he trial judge's disposition is an 'acquittal' if it is 'a legal determination on the basis of facts adduced at the trial relating to the general issue of the case'" (Pet. App. B 6a). Although the basis of the dismissal had nothing directly to do with the general issue in the case (the defendant's guilt or innocence), the court of appeals held that, since the facts relied on were also relevant to a determination of the general issue, the dismissal was in fact an acquittal (Pet. App. B 6a):

> While there may be occasions where an appeal may lie from a district court's dismissal of an indictment or information because further prosecution is not barred in the double jeopardy clause, we cannot agree that this is such a case. Here the record indicates that defendant filed post-trial motions for arrest of judgment, judgment of acquittal, and for a new trial. The district court, in reaching its legal determination, relied on facts adduced at trial relating to the general issue of the case.

Having concluded that the order was an "acquittal," the court of appeals, relying on *United States* v. *Sisson*, *supra*, 399 U.S. 267, held that appellate review was barred even though the only relief sought was an order vacating the dismissal and directing the entry of a judgment of conviction (Pet. App. B 6a):

> Quite apart from the statute, it is, of course, well settled that an acquittal can "not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution * * *. [I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence," *United States* v. *Ball*, 163 U.S. 662, 671 (1896).

ARGUMENT

I

INTRODUCTION AND SUMMARY

The Criminal Appeals Act, as amended by the Omnibus Crime Control and Safe Streets Act of 1970 (84 Stat. 1890), was expressly intended to authorize a government appeal from an order of the district court terminating a criminal prosecution in any case in which appeal would not violate the Double Jeopardy Clause. The Act, as the court of appeals held in this case, "establish[es] the double jeopardy clause as the only bar to appeals by the United States from a dismissal of an indictment or information" (Pet. App. B 6a).[9]

[9] The original version of the 1970 amendment to the Criminal Appeals Act proposed by the Senate Judiciary Committee, unlike the final version, was not pegged specifically to the Double Jeopardy Clause. Instead, it provided for an appeal from all orders terminating a criminal prosecution "except that no appeal shall lie from a judgment of acquittal" (S. Rept. No. 91-1296, *supra*, at 1). The Senate Report defined a "true acquittal" as one "based upon the insufficiency of the evidence to prove an element of the offense" (*id.* at 24). See also letter of Solicitor General Erwin N. Griswold, responding to a request [Continued]

The only issue presented in this case, therefore, is whether the Double Jeopardy Clause bars an appeal from an order, entered after a jury verdict of guilty, dismissing an indictment because of unnecessary pre-indictment delay. The conclusion of the court of appeals that such an appeal is barred by the Double Jeopardy Clause was based on its determination: (1) that the Double Jeopardy Clause bars an appeal from a judgment of acquittal entered notwithstanding a jury verdict of guilty, even when a successful appeal would not result in a retrial but merely in the entry of a judgment of conviction in accordance with the verdict of the jury, and (2) that a post-conviction order dismissing an indictment, which was not based on the sufficiency of the evidence, is an acquittal. We submit that both of those determinations were erroneous.

1. The issue whether the Double Jeopardy Clause bars an appeal from an order terminating a criminal prosecution in favor of the accused does not, in our view, depend on the label attached to the order, but upon whether the relief sought would improperly subject a defendant to a second trial. Our brief in *Serfass* v. *United States*, No. 73-1424, explores this issue in the context of a *pretrial* order dismissing

[Continued]
from Senator John L. McClellan for his views on the proposed amendment (*id.* at 33):

"As stated above, S. 3132 closes these gaps by allowing the Government an appeal from any dismissal except one amounting to a 'judgment of acquittal', that is, a factual judgment that the defendant is not guilty of the crime charged and is thereby entitled to protection against double jeopardy."

an indictment on the merits. There we show that, even though such a pretrial order has been or could be characterized as an "acquittal," an appeal by the United States does not violate the Double Jeopardy Clause because the defendant had never been placed in initial jeopardy by the commencement of a trial. Accordingly, even though the appeal seeks a reversal of the order of dismissal and a remand for trial, the defendant cannot complain that he is being placed in jeopardy of a second trial for the same offense.

In the instant case and in *United States* v. *Jenkins*, No. 73-1513, on the other hand, the order dismissing the indictment was entered after trial. But since in both cases the appeal seeks a remand to the district court for further proceedings that would not involve a retrial, it follows similarly that the defendant cannot complain that he is in jeopardy of being tried twice for the same offense. Indeed, for years this Court entertained direct appeals from post-verdict orders in arrest of judgment, where the relief sought was an order compelling the entry of a judgment of conviction in accordance with the verdict of the trier of fact.

Moreover, had the district court here entered a judgment of conviction, and had it been the court of appeals that directed dismissal of the indictment on the ground of pre-indictment delay, there would be no question about the right of the United States, consistent with the Double Jeopardy Clause, to seek further review by way of a petition for rehearing or a petition for a writ of certiorari. Indeed, this Court

has declined to "subscribe to * * * a theory" that would bar such relief from an order of the court of appeals (*Forman* v. *United States*, 361 U.S. 416, 426) and has repeatedly entertained petitions for writs of certiorari from orders of courts of appeals directing the dismissal of indictments on the merits after a judgment of conviction had been entered.[10] There is no reason, as a matter of law or policy, why different rules should apply simply because it is a district court that has directed the dismissal of an indictment under similar circumstances. As Judge Learned Hand wrote for the court of appeals in *United States* v. *Zisblatt*, 172 F. 2d 740, 743 (C.A. 2), appeal dismissed, 336 U.S. 934:

> * * * [T]he question becomes whether to reverse the dismissal and enter a judgment of conviction upon the verdict would violate the defendant's constitutional privilege. Had the trial judge directed a verdict, so that it would have been necessary upon reversal to subject the defendant to trial before a second jury, that would be "double jeopardy", but, although the Constitution gives an accused person the benefit of any mistakes in his favor of the first jury he encounters, whether it has passed upon his guilt or not, it does not extend that privilege to mistakes in his favor by judges. Indeed, were the opposite true, all appeals from decisions in arrest of judgment would be constitutionally futile because no judgment of conviction could be entered when they were reversed.

[10] *E.g.*, *United States* v. *Maze*, 414 U.S. 395; *United States* v. *Russell*, 411 U.S. 423.

> So long as the verdict of guilty remains as a datum, the correction of errors of law in attaching the proper legal consequences to it do not trench upon the constitutional prohibition.

Our brief in *United States* v. *Jenkins*, No. 73-1513, which was set down by this Court for argument in tandem with the instant case, fully discusses this issue and sets forth our arguments in support of the view that the Double Jeopardy Clause does not bar an appeal from a post-jeopardy dismissal of an indictment after the finder of fact has determined that the defendant committed the acts charged in the indictment, even where the order may be properly characterized as an acquittal. We shall, therefore, rely on our brief in *Jenkins* with respect to that issue and concentrate our argument in this brief on the alternative claim that, even assuming an appeal by the United States from a post-verdict judgment of acquittal is barred by the Double Jeopardy Clause, a dismissal of an indictment for unnecessary delay in prosecution is not an acquittal.

2. The issue whether a judge's action amounts to an acquittal, as Mr. Justice White has observed, "admits of no single answer, but depends on the reasons for making the inquiry in the first place." *United States* v. *Sisson*, 399 U.S. 267, 328-329 n. 4 (dissenting opinion). We have already stated our view that, in terms of the "reason for making the inquiry here," it is irrelevant what label is attached to the judgment of the district court; the critical issue is whether a successful appeal will result in a retrial. Accordingly, to the extent that it may be said that the Double

Jeopardy Clause bars an appeal from a judgment of "acquittal," it does so only where the "acquittal" has been returned by the trier of fact, and a ruling against the defendant on appeal would require a retrial.

While there is dictum in some opinions suggesting that an appeal from an "acquittal" would be barred even where such a retrial would not be necessary,[11] the common thread that runs through every statement or restatement of the rule, is that, to be unappealable, the judgment of acquittal must have been based upon a determination that the defendant has not been proven guilty of the crime for which he has been tried. Under that settled definition, it is plain that the order in this case, terminating the prosecution on the ground of unnecessary delay in indictment, which "rested on grounds that had nothing to do with guilt or innocence or the truth of the allegations in the indictment" (*United States* v. *Marion*, *supra*, 404 U.S. at 312), was not an acquittal. And, indeed, even these courts of appeals which have held that a *pretrial* dismissal on the merits is an "acquittal" and therefore not appealable have consistently entertained appeals from pretrial dismissals based on unnecessary delay.

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[11] Largely because an appeal from a judgment of acquittal entered upon a verdict of not guilty by a jury of necessity involves a request for a second trial, it has become common shorthand to say that the Double Jeopardy Clause bars an appeal from a judgment of acquittal; as sometimes happens, the reason for the rule has been ignored on occasion, and there is in fact authority, at least by way of dictum, that an acquittal entered notwithstanding a verdict of guilty by a jury could not be appealed without violating the Double Jeopardy Clause even though a retrial is not sought. As previously indicated, we deal with this in our brief in *Jenkins*.

Largely ignoring this crucial elementt in the definition of an "acquittal," the court of appeals here relied upon language, taken out of context,, from *United States* v. *Sisson, supra,* 399 U.S. at 289–290 n. 19, to the effect that a judge's disposition is am "acquittal" if it is "a legal determination on the basis of facts adduced at the trial relating to the general issue of the case" (Pet. App. B 6a). It is apparent in context that the Court in *Sisson* did not intend to formulate any new definition of an acquittal, but merely to restate the rule that the termination of a prosecution after trial based on a resolution of the general issue in the case in favor of the defendant is an acquittal. However, the court of appeals here construed the language literally, finding it to mean that an acquittal results any time the order terminating the prosecution after trial is based upon evidence heard at the trial, without regard to whether the dismissal is based upon a determination that a defendant has not beem proven guilty. Such a definition of the term "acquitttal" is contrary to every authority that has considered the concept, going back even to Blackstone's famous statement of the double jeopardy principle.

II

AN ORDER TERMINATING A PROSECUTION BECAUSE OF UNNECESSARY DELAY IN INDICTMENT IS *NOT* AN ACQUITTAL

The order of the district court tterminating the prosecution in this case on the groundl of unnecessary pre-indictment delay was not based upon a determination that the evidence presented tto the jury was

insufficient to establish respondent's guilt; indeed, the district court twice denied respondent's motion for a directed verdict of acquittal (once after the close of the prosecution's case-in-chief and again after the return of the guilty verdict; see *supra*, p. 8). Moreover, *United States* v. *Marion, supra*, 404 U.S. 307, makes clear, if any authority is necessary, that an order terminating a criminal prosecution on the ground of unnecessary delay does not involve a determination of the defendant's guilt or innocence. In *Marion* the district court had granted a pretrial motion to dismiss the indictment on the ground of unreasonable delay in bringing the indictment, stating that the defense of the case was "bound to have been seriously prejudiced by the delay of at least some three years in bringing the prosecution that should have been brought in 1967, or at the very latest early 1968" (404 U.S. at 310). This Court, construing the old Criminal Appeals Act, concluded that the order of the district court could be appealed. In doing so, it rejected the notion that the district court's ruling could be considered a determination relating to the guilt or innocence of the accused (404 U.S. at 312):

> The motion to dismiss rested on grounds that had nothing to do with guilt or innocence or the truth of the allegations in the indictment but was, rather, a plea in the nature of confession and avoidance, that is, where the defendant does not deny that he has committed the acts alleged and that the acts were a crime but instead pleads that he cannot be prosecuted because of some extraneous factor, such as the

running of the statute of limitations or the denial of a speedy trial.

Moreover, while the Court observed in *Marion* that a determination whether a defendant suffered actual prejudice as a result of unnecessary delay must sometimes await the events at trial,[12] it seems clear that the determination of this issue after trial has no more to do with a defendant's guilt or innocence than a pretrial dismissal of an indictment on the same ground would have. Indeed, it is apparent that events at trial in the instant case disclosed very little in addition to what had already been disclosed at the pretrial hearings. What happened, quite simply, is that the district judge changed his mind. The issue therefore is whether this order is converted into an unappealable "acquittal" for the purposes of the Double Jeopardy Clause merely because the district court relied upon evidence heard at the trial that was also, quite fortuitously, relevant to the general issue of respondent's guilt or innocence. That it is not so converted emerges plainly from a consideration of the history of the Double Jeopardy Clause and the cases that have construed it.

[12] The Court stated (404 U.S. at 326):

"In light of the applicable statute of limitations, however, these possibilities ['inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost'] are not in themselves enough to demonstrate that appellees cannot receive a fair trial and to therefore justify the dismissal of the indictment. Events of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature."

A. THIS DISMISSAL WAS NOT AN ACQUITTAL UNDER THE COMMON LAW DEFINITION OF THE CONCEPT

The starting point for the present inquiry is the definition of acquittal under the common law rule, which the framers intended to perpetuate in the Double Jeopardy Clause. See *Kepner* v. *United States*, 195 U.S. 100, 125. The most succinct statement of that rule, and one "which greatly influenced the generation that adopted the Constitution,"[13] is found in 4 *Blackstone's Commentaries*, Ch. XXVI, pp. 335–336 (1900). There, in describing the common law plea of *autrefoits acquit*, Blackstone observed:

> * * * [T]he plea of *autrefoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence. And hence it is allowed as a consequence, *that when a man is once fairly found not guilty upon any indictment*, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime. [Emphasis added.]

Similarly, IV Hawkins' *Pleas of the Crown* (1795 ed.) described the common law plea of "former acquittal" as resting on a determination that the defendant was not guilty (pp. 311–312):

> The plea of *autrefoits acquit* is grounded on this maxim, that a man shall not be brought into

[13] *Green* v. *United States*, 355 U.S. 184, 187–188.

tion in the trial court)."[15] Friedland, *Double Jeopardy* 285–286 (1969). The underlying basis of this rule was apparently the concern that, upon a new trial, the prosecutor "would see where he failed, and might use ill means to prove what he failed before." 21 Viner, *A General Abridgment of Law and Equity* 478–479 (1793 ed.). But, of course, whatever validity there is to this consideration of policy, it is unrelated to the correctness of characterizing the order here as an "acquittal"; moreover, the policy underlying this aspect of the common law rule is inapplicable to the instant case since a retrial is not being sought.

In sum, it is plain that, under the definition of "acquittal" as that term was applied at common law in determining the scope of the protection afforded by the "universal maxim * * * that no man is to be brought into jeopardy of his life more than once for the same offense," an order terminating a prosecution on the ground of unreasonable delay in indictment, after a guilty verdict, is not an acquittal.[16] As we

[15] Cf. *United States* v. *Jenkins*, 490 F. 2d 868, 873–874 (C.A. 2), certiorari granted May 28, 1974 (No. 73-1513), where Judge Friendly wrote:

"The history [of the Double Jeopardy Clause] may leave it open to argue that the framers did not regard the crown's inability to appeal an acquittal after a trial on the merits as part of the common law concept of double jeopardy but rather as an independent principle, to be followed for a century [in England] but not incorporated in the clause, although the general flavor of the debate * * * is somewhat to the contrary."

[16] "In England [under the common law] the judge could not even direct a verdict of acquittal for legal insufficiency of the evidence; his only power, at least in cases involving felonies, was to recommend royal clemency, which was granted as a

[Continued]

danger of his life for one and the same offense, more than once. From whence it is generally taken, by all the books, as an undoubted consequence, *that where a man is once found "not guilty" on an indictment* or appeal free from error, and well commenced before any court which hath jurisdiction of the cause, he may, by the common law, in all cases whatsoever plead such acquittal in bar of any subsequent indictment or appeal for the same crime. [Emphasis added.]

More specifically, Hawkins observed (*id.* at 316):

Yet it seems, that no other discharge of an indictment will bar an appeal, and no other discharge of an appeal will bar an indictment, but only an acquittal by battle, or *an acquittal by verdict on the general issue*, finding the defendant's innocence; as where it finds him not guilty on such an issue, on an indictment or appeal of any felony whatsoever; or where it finds him guilty of homicide *se defendendo*, or *per infortunium*, on an indictment of murder.[14] [Emphasis added.]

While this common law plea of "former acquittal" was essentially an application of the doctrine of res judicata and did not therefore bar an appeal, "an independent principle" evolved that the Crown *could not seek a new trial* after an acquittal (by appeal or by mo-

[14] The "appeal" to which Hawkins made reference was not the contemporary American process of appellate review of trial errors, but rather the quasi-criminal trial proceeding which could be commenced at common law by a private party. See Friedland, *Double Jeopardy* 8 (1969); Kirk, *"Jeopardy" During The Period Of The Year Books*, 82 U. Pa. L. Rev. 602, 605–606.

now show, the Double Jeopardy Clause has in this respect been construed in the same manner as the English common law principle.

B. THE DISMISSAL WAS NOT AN ACQUITTAL UNDER THE ESTABLISHED CONSTRUCTION OF THE DOUBLE JEOPARDY CLAUSE BY THIS COURT

The leading case, in which it was first stated that a "verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy," was *United States* v. *Ball*, 163 U.S. 662, 671. *Ball* involved a "verdict of the jury, after a trial upon the issue of guilty or not guilty" (*id.* at 670), and it was in this context that it was held "that a general verdict of acquittal upon the issue of not guilty to an indictment * * * is a bar to a second indictment for the same [offense]" (*id.* at 669).[17]

A similar definition of an "acquittal" was employed in *Kepner* v. *United States*, *supra*, 195 U.S. 100, which involved an appeal from a judgment of acquittal after a trial without a jury. There, in discussing the *Ball* case, it was stated (195 U.S. at 133):

> The *Ball* case, 163 U.S., *supra*, establishes that to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment. That is practically the case under consideration, viewed in the most favorable aspect for the Government.

[Continued]
matter of course." *United States* v. *Weinstein*, 452 F. 2d 704, 715 (C.A. 2), and authorities cited, certiorari denied *sub nom. Gruenberger* v. *United States*, 406 U.S. 917.

[17] Since a subsequent prosecution, rather than an appeal, was involved in *Ball*, the statement regarding the nonappealability of an acquittal (163 U.S. at 671) is dictum.

> *The court of first instance, having jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty;* to try him again upon the merits, even in an appellate court, is to put him a second time in jeopardy for the same offense * * *. [Emphasis added.]

Thus, the essence of the concept of "acquittal" has long been recognized as involving the failure of the prosecution to submit convincing evidence establishing the existence of every element of the offense, *i.e.*, the prosecution's failure to adduce sufficient evidence of the defendant's guilt. As *United States* v. *Marion* (discussed more fully at pp. 21–22, *supra*) clearly holds, a motion to dismiss on grounds of pre-indictment delay has "nothing to do with guilt or innocence or the truth of the allegations in the indictment * * *." 404 U.S. at 312. It is thus unquestionably not an "acquittal" under the established meaning of the term.

The court of appeals in the instant case ignored both the common law definition of an acquittal and the oft-cited opinions in *Ball* and *Kepner* in concluding, without a functional analysis of the nature of the district court's action, that the dismissal for pre-indictment delay was an acquittal. It relied upon the Court's reformulation of the concept in *United States* v. *Sisson*, *supra*, 399 U.S. 267, reiterated in *United States* v. *Jorn*, *supra*, 400 U.S. 470, 478 n. 7:

> [T]he trial judge's disposition is an "acquittal" if it is "a legal determination on the basis of facts adduced at the trial relating to the general issue of the case * * *."

We do not dispute that it is literally true that the evidence on which the district court relied in dismissing the indictment was "adduced at the trial" (it was, of course, also adduced at the pretrial hearings) and that (quite coincidentally) it related "to the general issue of the case" as well as to the quite distinct issue on which the judge ruled in dismissing the indictment. We do urge that the court of appeals' literal application of the *Sisson-Jorn* formulation erroneously extended the concept to circumstances to which it was never intended to apply.

When examined in context, we submit that the Court's real meaning could be more precisely, albeit less elegantly, stated by the addition of the following bracketed phrase to the definition of "acquittal": "* * * an 'acquittal' * * * is 'a legal determination [*of the general issue of the case*] on the basis of facts adduced at the trial relating to the general issue of the case.' " [14] As so stated, it is clear that the fortuitous circumstance that the facts relied on for dismissal are also relevant to the issue of guilt or innocence is not controlling, so long as guilt or innocence is not the basis of the trial court's ruling. This view is entirely consistent with *Sisson* and *Jorn*.

In *Sisson*, where the offense was a refusal to submit to induction into the armed services, the defendant claimed before trial that he was a conscientious objector to military service in Vietnam. At trial,

[14] Of course, in *Sisson* and *Jorn* the Court did not need the added phrase because, as we show below, it was not relevant to the discussion of the concept of acquittal in those cases.

Sisson based his defense principally upon his contention that American participation in the conflict was illegal but presented evidence in support of his conscientious objection claim as well. After a guilty verdict, the district court granted what it termed a motion in arrest of judgment, holding that the Free Exercise Clause of the First Amendment prohibited Sisson's conviction for refusal to submit to induction. The judge recited the facts of the case and explained that Sisson's testimony and demeanor as a witness gave support to his claim of conscientious objection to service in Vietnam.

On appeal, this Court rejected the district court's characterization of its order as an "arrest of judgment" (which would have been appealable under the terms of the old Criminal Appeals Act) and described it instead as an acquittal. In explaining why the post-guilty-verdict order was the equivalent of a judgment of acquittal, the Court analogized the case "to one in which a jury was instructed" that it was obligated to return a verdict of not guilty if it found that the defendant was "sincere" and had been governed in his refusal to report for induction "by conscience as a martyr obedient to an orthodox religion" (399 U.S. at 289). Had the jury returned a verdict of not guilty upon this charge—even though the charge was erroneous—"its verdict of acquittal could not be appealed under [former] § 3731" or, according to the Court's dictum, the Double Jeopardy Clause (*ibid.*).

The Court then explained the bearing of its hypothetical case on a case like *Sisson*, in which the dis-

trict court entered the judgment after a guilty verdict (*id.* at 290; footnote omitted):

> There are three differences between the hypothetical case just suggested and the case at hand. First, in this case it was the judge—not the jury—who made the factual determinations. This difference alone does not support a legal distinction, however, for judges, like juries, can acquit defendants, see Fed. Rule Crim. Proc. 29. Second, the judge in this case made his decision *after* the jury had brought in a verdict of guilty. Rules 29(b) and (c) of the Federal Rules of Criminal Procedure, however, expressly allow a federal judge to acquit a criminal defendant after the jury "returns a verdict of guilty." And third, in this case the District Judge labeled his post-verdict opinion an arrest of judgment, not an acquittal. This characterization alone, however, neither confers jurisdiction on this Court, see n. 7, *supra*, nor makes the opinion any less dependent upon evidence adduced at the trial. In short, we see no distinction between what the court below did, and a post-verdict directed acquittal.

The emphasis on Rule 29 is significant, because a district court may grant a judgment of acquittal pursuant to Rule 29 only "if the evidence is insufficient to sustain a conviction." And it was for this reason that the Court observed in *Sisson* that "what the District Court did in this case cannot be distinguished from a post-verdict acquittal entered on the ground that the Government did not present evidence sufficient to prove [an essential element of the offense] that Sisson was insincere" (399 U.S. at 299).

The single sentence from the opinion in *Sisson*, which was quoted in *Jorn* and formed the basis for the holding of the court of appeals below, appeared in a footnote to the textual discussion set forth above analogizing the district court's order in "arrest of judgment" to a judgment of acquittal pursuant to Rule 29. Mr. Justice White's dissenting opinion had criticized the analogy, contending that the appealability of the order should be governed by what the district court actually did, not what it might have done. It was in rejoinder to that criticism that the Court observed (399 U.S. at 290 n. 19):

> Our conclusion does not, as suggested in dissent, *post*, at 327 (dissenting opinion of MR. JUSTICE WHITE), rest on the fact the District Court "might have" sent the case to the jury on the instruction referred to in the text, but instead on what it did do—*i.e.*, render a legal determination on the basis of facts adduced at the trial relating to the general issue of the case, see, *infra*, at 301. Neither dissenting opinion explains what "large and critical" difference, *post*, at 329, exists between its expansive notion of what constitutes a decision arresting judgment and *a post-verdict acquittal entered by the judge after the jury has returned a verdict of guilty pursuant to Fed. Rule Crim. Proc. 29.* * * * [Emphasis added.]

It is apparent in context that the phrase "legal determination on the basis of facts adduced at the trial relating to the general issue" merely described the legal determination that must be made on a Rule 29 motion for a judgment of acquittal, *i.e.*, whether the

evidence is sufficient as a matter of law to establish each of the essential elements of the crime. This is entirely consonant with the traditional definition of acquittal at common law and as described in *Ball* and *Kepner;* it has, moreover, nothing to do with expanding the concept of acquittal to cover actions taken on a basis other than the establishment of guilt or innocence.

There is nothing in the brief reference to *Sisson* in *Jorn* that supports a contrary conclusion. *Jorn* involved an appeal from an order dismissing an information on double jeopardy grounds after a district judge had improperly and unilaterally declared a mistrial to permit several witnesses to consult with their attorneys in order to determine whether they should waive their privilege against self-incrimination and testify. Justices Black and Brennan, who concurred in the judgment affirming the dismissal, concluded "that the Court lacks jurisdiction over this appeal *under* [*former*] *18 U.S.C. § 3731* because the action of the trial judge amounted to an acquittal of appellee and therefore there was no discretion left to the trial judge to put appellee again in jeopardy" (400 U.S. at 488; emphasis added). Responding to this argument, Mr. Justice Harlan wrote (*id.* at 478 n. 7):

> It is clear from the record in this case that Judge Ritter's action cannot, as two members of the Court suggest, be classified as an "acquittal" for purposes of this Court's jurisdiction over the appeal under 18 U.S.C. § 3731. * * *
>
> Of course, as we noted in *Sisson, supra*, at 290, the trial judge's characterization of his own action cannot control the classification of the action for purposes of our appellate jurisdiction. But *Sisson* goes on to articulate the criterion of an "acquittal" for purposes of assessing our jurisdiction to review: the trial judge's disposition is an "acquittal" if it is "a legal determination on the basis of facts adduced at the trial relating to the general issue of the case * * *." *Sisson, supra*, at 290 n. 19. The record in this case is utterly devoid of any indication of reliance by Judge Ritter on facts relating to the general issue of the case, thereby surely distinguishing this case from *Sisson*, and, one would think, under the very reasoning of *Sisson*, compelling the conclusion that whatever else Judge Ritter may have done, he did not "acquit" the defendant in the relevant sense.

It is apparent, first, that the "relevant sense" in which it was necessary to determine if the district court's order in *Jorn* was an "acquittal," was for purposes of the *statutory* inquiry whether the subsequent order dismissing the indictment was appealable under former Section 3731, which had been construed in light of its peculiar legislative history (*United States* v. *Sisson, supra,* 399 U.S. at 289). On the other hand, the issue in this case is whether an appeal from the order dismissing the indictment is *constitutionally* barred. Moreover, the holding in *Jorn* is plainly consistent with the definition of an acquittal in the sense here relevant. The district court's declaration of mistrial in *Jorn* had not entailed "a legal determination" that the "facts adduced at the trial relating to the general issue of the case" were insufficient to establish the defendant's guilt, and accordingly it was held

that the order declaring the mistrial was not an "acquittal."

We do not believe it can be suggested, in light of the context from which the definition of an acquittal in *Sisson* was taken, that the Court in *Jorn* meant to imply that any order setting aside a judgment of conviction is an acquittal (for the purpose of the Double Jeopardy Clause) if the district court relied on evidence heard at the trial, even though the district court may be satisfied that the evidence is sufficient to sustain conviction. Indeed, if this were the import of the holding in *Jorn*, then every time a district court judge set aside a judgment of conviction and ordered a new trial in the interest of justice because of an error that may have been made at trial, *i.e.*, an erroneous charge or admission of evidence, or because of newly discovered evidence, such an order setting aside the verdict of conviction would be an "acquittal" simply because the district court may have considered evidence it heard at the trial.[19] The Court in *Jorn* could hardly have intended such a result.

[19] Of course, such an order is not different in any material way from an order of the court of appeals reversing a judgment of conviction and ordering a retrial. And the same considerations of policy that permit a retrial after such a reversal (see *United States* v. *Tateo*, 377 U.S. 463, 466), plainly permit a retrial where the district court acts prior to an appeal. Similarly, here, the order of the district court, entered after a judgment of conviction, was not different in any material way from an order of the court of appeals reversing a conviction because of unnecessary delay in prosecution, and since further appellate review may be sought from such an order, there would seem to be no rational justification for a holding that an appeal from the order of the district court is barred by the Double Jeopardy Clause.

In sum, it is submitted that, in the sense here relevant, the order of the district court was not an "acquittal" under the clear holdings of this Court.[20] Moreover, as we now show, our reading of these holdings—including that of *United States* v. *Sisson*—is supported by every court of appeals decision that has considered the issue other than that in the instant case.

[20] *Fong Foo* v. *United States*, 369 U.S. 141, is another case in which a termination of the trial in favor of the defendants by the district court, labeled an "acquittal" by that court and so treated by this Court, was held to be unreviewable. Arguably, *Fong Foo* is a case that, by treating the trial court's termination of the trial shortly after commencement of the prosecution's case as an acquittal, strays somewhat from the concept of acquittal as it has otherwise been recognized. However, the judgment of "acquittal" was based at least in part on the district court's determination that the witnesses were not testifying truthfully, and its view that, apparently, a conviction could not be obtained in light of their testimony because the proof of guilt would necessarily be insufficient (see concurring opinion of Harlan, J., 369 U.S. at 143–144; *Fong Foo* record, No. 64, Oct. Term 1961, at 364, 377, 573–574).

While the result in *Fong Foo* is consistent with our position here, we do not agree with the opinion's rationale placing controlling significance upon the label the district court attached to its preverdict order. The Court's opinion clearly indicated that, had the district court said it was declaring a mistrial rather than entering a judgment of acquittal, a retrial would have been permitted. It distinguished *Gori* v. *United States*, 367 U.S. 364, which involved a mistrial, on the ground that "[t]he trial [in *Fong Foo*] did not terminate prior to the entry of judgment * * *. It terminated with the entry of a final judgment of acquittal * * *." (369 U.S. at 143).

The clear import of this reasoning is that by labeling his order an "acquittal", even if there is no authority to enter such an order and it is not based on the sufficiency of the evidence, a district judge can insulate his action from further review. This reasoning has been explicitly rejected in *United States* v.

(Continued)

C. THE CONSISTENT APPLICATION OF THE *SISSON* DEFINITION OF ACQUITTAL IN THE COURTS OF APPEALS SHOWS THAT RESPONDENT WAS NOT ACQUITTED

Apart from the instant case, the courts of appeals have without exception construed the definition of "acquittal" stated in *Sisson* to mean a determination that the evidence at trial was insufficient to establish the defendant's guilt beyond a reasonable doubt. This definition has not only been applied to orders setting aside guilty verdicts returned by the trier of fact, but to pretrial orders in those circuits that have held that an acquittal may not be appealed even where jeopardy has not attached.

1. Post-trial orders

Perhaps the leading post-trial-order case permitting appellate review of an order dismissing an indictment is *United States* v. *Weinstein, supra*, 452 F. 2d 704, certiorari denied *sub nom. Granberger* v. *United*

(Continued)

Sisson, supra, 399 U.S. at 279 n. 7; the appropriate inquiry is whether, under the principles governing the permissibility of retrials after a trial has been terminated prior to verdict, the defendant may be subjected to a second trial (if that is the remedy sought on appeal). Compare *United States* v. *Jorn*, 400 U.S. at 478 (plurality opinion), with *Illinois* v. *Somerville*, 410 U.S. 458.

Moreover, if labels are controlling, then *Fong Foo* would not justify dismissal of the appeal here, since the district court did not enter a judgment which it denominated an "acquittal." Of course, *Fong Foo* is also distinguishable from this case because there, as this Court observed, "the Court of Appeals set aside the judgment of acquittal and directed that the petitioners be tried again for the same offense" (369 U.S. at 143). As we stated at the outset, no such relief is requested here.

States, 406 U.S. 917. There, the district court entered a post-conviction order dismissing an indictment in the "interests of justice." Even thought the dismissal had been based on evidence heard at the trial that related to the general issue in the case, the court of appeals held that "[t]he issuance of the writ [of mandamus] in this proceeding will not subject [the defendant] to retrial in violation of his right to be protected against double jeopardy" (452 F. 2d at 712–713). Rejecting the claim that *Sisson* required that the order of the district court be treated as an acquittal, Chief Judge Friendly stated for the court (*id.* at 714; emphasis added):[21]

> [D]efendant's reliance on the *Sisson* holding that an appellate court will look at what a district court did rather than at what it said it was doing, 399 U.S. at 270, 90 S. Ct. 2117, 26 L.Ed. 2d 608, is misplaced. What the judge did in *Sisson* was entirely plain. He refused to enter judgment on a verdict because, in his view, the Constitution prohibited him from doing so. *This was, in truth and fact, a judgment of acquittal; the judge believed that, with the evidence taken in the light most favorable to the Government, it still would not support a conviction.* The Supreme Court held that *such a judgment of acquittal* could not be transformed into the rather technical concept of an arrest of judgment, to wit, "the act of a trial judge refusing to enter judgment on the verdict because of an

[21] See also *United States* v. *Dooling*, 406 F. 2d 192 (C.A. 2), certiorari denied *sub nom. Persico* v. *United States*, 395 U.S. 911.

> error appearing on the face of the record," 399 U.S. at 280, 90 S. Ct. at 2125, simply by his calling it such. It would be a far cry from this to hold that the order here in question was a judgment of acquittal, which the judge repeatedly said he did not intend to enter, could not rightly have entered and, in all probability, had lost the power to enter.

Similarly, in *United States* v. *Whitted*, 454 F. 2d 642, the Court of Appeals for the Eighth Circuit entertained jurisdiction of an appeal in circumstances virtually identical to the instant case. There the district court, based in part on evidence heard at the trial (see 454 F. 2d at 643), had dismissed the indictment on the ground that it could not be sure whether the indictment against the defendant was returned on the basis of the evidence before the grand jury or on the basis of possible bias and prejudice against him (such a motion had been rejected prior to trial). Relying upon *United States* v. *Weinstein*, *supra*, and *United States* v. *Dooling*, *supra*, the court of appeals reversed the order dismissing the indictment. Moreover, it stated that on remand "[a] judgment of acquittal would be appropriate only if the evidence at trial had been insufficient to sustain Whitted's conviction" (454 F. 2d at 646).[22]

In *United States* v. *Jenkins*, *supra*, 490 F. 2d 868, certiorari granted May 28, 1974 (No. 73-1513), the Second Circuit applied the same standard. While it

[22] See also *United States* v. *McDaniel*, 482 F. 2d 305 (C.A. 8).

was there held that the order dismissing an indictment after a non-jury trial was an acquittal, the question was determined by the criteria we urge here. Judge Friendly, writing for the court of appeals in *Jenkins*, observed (490 F. 2d at 880): "*Sisson* held that when a guilty verdict has been nullified by a judge's decision to acquit *on the merits*, the Double Jeopardy clause prevented an appellate court from directing the entry of a judgment of conviction" (emphasis supplied).[23] See also *United States* v. *McFadden*, 462 F. 2d 484, 486 (C.A. 9), which cites *Sisson* in holding that when a post-trial order "goes to the general issue" it "must be held to be a judgment of acquittal."

In sum, except for the holding below, the courts of appeals have construed *Sisson* to define an acquittal as a post-trial order "entered on the ground that the Government did not present evidence sufficient to prove [an essential element of the offense]" (399 U.S. at 299). They reject implicitly the proposition, adopted below, that an "acquittal" results from the mere fact that the district court relies on evidence heard at the trial in setting aside an indictment (after con-

[23] Jenkins was charged with knowingly failing to report for induction as ordered. The district court dismissed the indictment after trial on the ground that Jenkins was not legally bound to obey the order because the local board had refused erroneously to reopen his classification to consider a post-induction-order claim for treatment as a conscientious objector. Like *Sisson*, and unlike this case and *United States* v. *Weinstein*, *supra*, the district court in *Jenkins* held—in effect—that the evidence was insufficient to warrant a conviction.

viction) on grounds that do not relate to the sufficiency of the evidence.

2. Pretrial orders

A number of courts of appeals have held that an appeal from a judgment of acquittal is barred by the Double Jeopardy Clause even if the judgment was entered before any trial has begun. While we believe that these decisions have erroneously applied the bar of the Double Jeopardy Clause to pre-jeopardy orders terminating a criminal case,[24] the definition of acquittal employed in those cases is otherwise consistent with our reading of *Sisson*. Thus, even those courts of appeals that have held that an appeal may not be taken from a pretrial acquittal have entertained appeals from pretrial orders terminating prosecutions for unreasonable delay.

For example, while the Court of Appeals for the Seventh Circuit has held (relying on *Sisson*) that a pretrial dismissal "on the merits" was an acquittal from which an appeal is barred by the Double Jeopardy Clause (*United States* v. *Pinto*, 454 F. 2d 657, 663–664), this principle was deemed "inapplicable" to a pretrial order terminating a prosecution because of unnecessary pre-indictment delay, clearly implying that the order was found not to be an acquittal. *United States* v. *Clay*, 481 F. 2d 133, 137 n. 11 (C.A. 7). Similarly, while the Court of Appeals for the Fifth Circuit has held that "[t]he present law of double jeopardy precludes retrial [and an appeal]

[24] See our brief in *Serfass* v. *United States*, No. 73-1424.

when the district court has ruled in favor of the defendant on facts going to the merits of the case if these facts were adduced at an evidentiary hearing" (*United States* v. *Lewis*, 492 F. 2d 126, 127), it stated in *United States* v. *Miller*, 491 F. 2d 638, 641 n. 1, that "an appeal from the dismissal of an indictment because of pre-indictment delay was not barred by double jeopardy."

Again, while the Court of Appeals for the Sixth Circuit has held that if an "indictment is dismissed as a result of a stipulated fact or the showing of evidentiary facts outside the indictment, which facts would constitute a defense on the *merits* at trial * * *, [it] operate[s] as an acquittal" for purposes of determining appealability (*United States* v. *Rothfelder*, 474 F. 2d 606, certiorari denied, 413 U.S. 922; emphasis supplied), it has likewise entertained appeals from pretrial orders terminating prosecutions for unnecessary delay or on other grounds not relating to the defendant's guilt or innocence. *United States* v. *Giacalone*, 477 F. 2d 1273; *United States* v. *Leininger*, 494 F. 2d 340.[25]

All of these cases demonstrate adherence to the traditional definition of an acquittal as a termination of the prosecution in favor of a defendant "on the merits" of the charge, that is, 'hat the evidence is

[25] Compare, also, *United States* v. *Hill*, 473 F. 2d 759 (C.A. 9), with *United States* v. *Richter*, 488 F. 2d 170 (C.A. 9); *United States* v. *Velazquez*, 490 F. 2d 29 (C.A. 2), petition for a writ of certiorari pending (No. 73-6493), with *United States* v. *Crutch*, 461 F. 2d 1200 (C.A. 2).

insufficient to sustain a conviction. There is no reason in law or policy to depart from that definition here.

CONCLUSION

The judgment of the court of appeals should be reversed and the cause remanded for determination of the merits of the appeal from the order of the district court.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
ANDREW L. FREY,
Deputy Solicitor General.
EDWARD R. KORMAN,
Attorney.

AUGUST 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974